IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 83

UNITED STATES OF AMERICA, EX REL.,
ROGER TOUHY,

Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, ILLINOIS STATE PENITENTIARY, JOLIET, ILLINOIS, AND
GEORGE R. McSWAIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Opinion Below.

The majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit (Rec. 159-173) are reported in 180 Fed. 2nd 321. The District Court rendered no formal opinion. Its judgment order appears in the record. (Rec. 144-145.)

Jurisdiction.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 24, 1950. The Petition for a Writ of Certiorari was filed on May 22, 1950, and was granted on October 9, 1950. (Rec. 177.) The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code. (28 United States Code, Section 1254 (1).)

Statement.

This proceeding was instituted by Roger Touhy who filed a Petition for Habeas Corpus in the United States District Court for the Northern District of Illinois, Eastern Division, on April 2, 1948, questioning the legality of a commitment pursuant to judgment and sentence of the Criminal Court of Cook County, Illinois under which he was being held in the Illinois State Penitentiary at Stateville, Illinois.

This Petition, as subsequently amended alleged that in the proceedings leading to petitioner's conviction and commitment, he was deprived of and denied the right to a fair trial guaranteed to him by Section 1 of Amendment XIV to the Constitution of the United States, among other things in that the representatives of the State of Illinois conspired to and did bring about petitioner's conviction for an alleged crime (kidnapping for ransom) which he did not commit, by means of the procurement and production in the trial of said cause of perjured testimony as to the connection of the petitioner with the alleged crime of kidnapping one John Factor. (Rec. 91, 92.)

By an Amendment filed May 31, 1949, the conspiracy charged was enlarged to include the agents of the Federal Bureau of Investigation and other attorneys, agents, and servants of the United States. (Rec. 109-112.)

A Writ of Habeas Corpus was issued by the District Court (Rec. 93-94) and a Return (Rec. 94-97), and Traverse and Amended Traverse to the Return were filed. (Rec. 104, 107, and 109.) At this stage of the proceedings, a subpoena *duces tecum* was duly issued and served upon George R. McSwain, special agent in charge of the Chicago Office of the Federal Bureau of Investigation directing him to produce before the District Judge, certain records in his possession including, "specifically transcript, records, memoranda, and other data with respect to certain show-

ups held in the offices of the Federal Bureau of Investigation, Chicago, Illinois, on or between the dates of July 19 to July 24, 1933, inclusive." (Rec. 113.)

On June 1, 1949, the case having been continued to that date, George R. McSwain, who was present in Court in response to the subpoena, was requested to produce the documents therein requested. (Rec. 115.) At this point, the Honorable Otto Kerner, Jr., United States Attorney advised the Court that in compliance with Department of Justice Order Number 3229 and Supplement Number 2 dated June 6, 1947*, the records were not produced and also apprised the Court of a letter received from the Attorney General of the United States, among other things stating (Rec. 116):

> "It is the Department's position that it should decline to produce the records in question."

In the course of the ensuing argument and colloquy (Rec. 114-126), Mr. Kerner urged the necessity of a determination as to the materiality of the subpoenaed documents, at which point the following transpired (Rec. 123):

> By the Court: I cannot determine whether they are material until I see them.
>
> By Mr. Kerner: That is correct, sir. That is the point upon which we argue.
>
> By the Court: Now what? Is this relator to be deprived of having his counsel look at them?
>
> By Mr. Kerner: I would undertake to say this—
>
> By the Court: I say, is he to be deprived of that?
>
> By Mr. Kerner: It is a matter of discretion with the Court to ascertain whether or not they are material, and I will provide them for the Court's personal perusal.
>
> By the Court: What can I do in looking at them without counsel looking at them? He cannot make his record on that.
>
> By Mr. Kerner: Well, I am standing on my instructions here that I cannot produce them, on the orders of the Attorney General.

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* For the convenience of the Court, these orders are set forth in full in an Appendix to this Brief.

The argument in open court concluded with a ruling by the court that Regulation Number 3229 as drafted is broader than the Statute permits. The court's remarks in full, together with Mr. Kerner's suggestion as to production of the documents in chambers being quoted in a footnote.* Thereafter, a recess as to this matter was taken until two o'clock P. M. (Rec. 126) at which time the United States Attorney appeared in chambers without the documents, stating, "I am still under orders not to actually produce the documents." (Rec. 127.)

In the course of the proceedings in chambers, counsel for the relator stated his feeling "That the proper thing to do would be to permit the court to examine these things without any of us" to which the court stated, "I don't want to

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* By the Court: I am of the opinion that the regulation as drafted is broader than the statute permits, because the statute provides that these regulations shall only be valid to the extent that they are "consistent with law".

Now I cannot believe that any department head, no matter how exalted he may be, can say to the courts that the records of his department may not be available to the investigation of questions heard in the courts. That cannot be true. And whether or not these particular papers in question here are material, I don't know. But parties to this proceeding have a right to have somebody other than the Department determine that question.

I would be very glad if this Court were not called upon to determine it, but apparently it is. And I want to proceed to determine that question. I want the advice of counsel in respect of my determination of it. I cannot look at these papers without the advice of counsel, without counsel advising me in what particular they may or may not be material. I want the advice of counsel for the relator, and I want the advice of counsel for the respondent. They are all reputable members of the Bar and officers of the Court.

I cannot believe that public security is going to be adversely affected by their seeing those papers.

Now, howsoever you want to meet that question is all right with me. I am ready to rule on it. I want to rule effectively; I don't want to say, "Please do this." If you can suggest a method whereby I can rule effectively I will be very glad to have it.

By Mr. Kerner: Your Honor, I have a suggestion. May I produce these documents before your Honor in chambers, with counsel present, and I shall read them?

see them without counsel." (Rec. 131.) Mr. Kerner also stated orally the nature of some of the information in the Reports. (Rec. 131-132.)

The colloquy in chambers terminated when, after the court stated he must have misunderstood Mr. Kerner's proposal, Mr. Kerner stated (Rec. 134):

> "I did not intend actually to bring the reports in because I was still under the orders of the department."

Thereupon Respondent McSwain was called as a witness, admitted service of the subpoena *duces tecum*, and in response to a question as to whether he had produced the documents in response to the subpoena, said that he had not produced the records and advised the Court as follows:

> "I must respectfully advise the Court that under instructions to me by the Attorney General, that I must respectfully decline to produce them in accordance with Department Rule No. 3229." (Rec. 135.)

Thereafter, respondent having persisted in his refusal to produce, the order here in question was entered, finding respondent guilty of contempt of Court in refusing to produce the records referred to, and committing respondent to the custody of the Attorney General of the United States or his authorized representative for imprisonment until he shall obey the order of the Court, or until discharged by due process of law. (Rec. 144, 145.)

The opinion of the Court of Appeals held that Department of Justice Order No. 3229 was valid and confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege (Rec. 168), and then proceeded to hold that under the circumstances of this case such waiver of privilege as is set forth in Supplement No. 2 to Order 3229 did not exist because the Court was unwilling to examine the material for the purpose of determining its materiality

and whether it was in the best public interest that such information should be disclosed. (Rec. 171.) The dissenting opinion of Circuit Justice Lindley adopted the view that the District Court was "deprived of the opportunity to exercise its judicial function and was perfectly justified in entering the order from which the appeal was taken." (Rec. 173.)

Specification of Assigned Errors to be Argued.

Petitioner submits that the Court of Appeals for the Seventh Circuit erred in the following respects:

(A) In holding that Department of Justice Order 3229 was valid;

(B) In reversing the Judgment Order of the District Court committing respondent McSwain to the custody of the Attorney General until the records in question shall have been produced.

SUMMARY OF ARGUMENT.

I.

This case squarely presents a question of invasion of the judicial functions of the courts involving the application of fundamental concepts of individual liberty.

A. The tender or proffer to the court was limited to the question of materiality only. Respondent's refusal to produce was absolute, and based solely on Order No. 3229. The departments position is supportable only on the theory that the executive has an absolute privilege to refuse production of subpoenaed records with a concomitant discretion to waive that privilege—a theory inconsistent with a Constitutionally independent judiciary.

B. Two aspects of the exercise of judicial power are here involved; (1) The determination of whether public interest or security demanded non-disclosure, an opportunity to make which was denied the district court, and (2) The determination of the materiality of the subpoenaed records, in the making of which a court is inherently entitled to the advice of counsel. Long range protection of the essential judicial functions may well warrant the risk of occasional rash disclosure involved in permitting counsel full participation in the public interest determination; but absent this problem there exists no reason to vary traditional judicial procedure merely because the government, and not a private party, is the possessor of the records sought.

If any individual regardless of his station is to be deprived of alleged exculpatory material at the whim of the Executive or a subordinate of his in a proceeding involving constitutional rights the fundamental American principles of individual liberty may well be in jeopardy.

II.

Department of Justice Order 3229 as utilized by the Department of Justice in this case, is inconsistent with law being an encroachment upon the judicial power vested in the courts by Article III, Section 1 of the Constitution of the United States.

The doctrine of separation of powers was adopted by the convention of 1787 to preclude the exercise of arbitrary power (dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52 (293). This Court in *Marbury* v. *Madison*, 1 Cranch 137 (1803) (1 Dallas, 3rd Edition (1854), 267, 268) established the power in the Courts to enforce compliance with its processes as against a claim of Executive privilege. Department of Justice Order 3229 usurps to the Executive the judicial function of determining the facts upon which the admissibility of evidence depends and is therefore inconsistent with law and invalid when tested in the light of the Constitutional principle of separation of powers.

III.

The decision of this Court in *Boske* v. *Comingore*, 177 U. S. 459, does not sustain the validity of Order 3229 in the light of the encroachment upon judicial powers here involved.

This Court in the *Boske* case was concerned with the limited problem of protecting an executive employee from the action of a state seeking to compel production of tax records. This Court was not there concerned with the rights of an individual asserting Constitutional guaranties and that decision should not be regarded as laying down a definitive rule of law establishing an absolute executive privilege. Particularly is this true in the light of the present vast expansion of the functions, offices, and agencies of the executive branch of the government.

ARGUMENT.

I.

This Case Squarely Presents a Question of Invasion by the Executive of the Judicial Function of the Courts Involving the Application of Fundamental Concepts of Individual Liberty.

(A)

As appears from the ruling of the District Court (Rec. 124, Footnote p. 4, *supra*), that court clearly had in mind determining the basic question of executive versus judicial power. Circuit Judge Lindley in his dissenting opinion also took this view of the problem.

The subpoenaed documents never were in court or chambers. Respondent McSwain's refusal to produce while on the witness stand was absolute, and was based on Order 3229,* not on Supplement Number 2* to that order. Supplement No. 2, among other things, expressly provides that "it is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files." (Rec. 121.)

Also, in the instant case, there never was an actual proffer or submission of the documents to the court for a determination of the question of public interest involved. The United States Attorney's tender (Rec. 123) was, advisedly or not, limited solely to the question of materiality. On

* For the convenience of the Court, these orders are set forth in full in an Appendix to this Brief.

that question as distinct from the question of public interest, the court, if it was to make a proper ruling was entitled to the advice of counsel; and the relator was entitled to make a record in connection with that determination.

It is respectfully submitted that on the basis of the facts as they occurred in the trial court, notwithstanding the willingness of counsel for the relator to let the court alone determine the propriety of production, the Attorney General and his agents did arrogate to themselves the absolute right to determine what should or should not be produced in response to the court's subpoena, and this action involved the exercise of the judicial function which always has resided, and under the Constitution, must reside with the courts.

The Department of Justice has been steadfast in the assertion of its right to make the final and conclusive determination of the question of production. In the Petition for a Writ of Certiorari in this case, this Court was referred to the statement of the Department's position appearing on page 5 of the Reply Brief for the United States in the case of *United States of America* v. *Cotton Valley Operators, et al.*, 339 U. S. 940. (Petition for Cert., p. 25.) The position there taken was reasserted in the Government's Brief in Opposition filed in this case. (Opp. Br., (1).) That Brief cited only Section 161 of the Revised Statutes and Department of Justice Order 3229. It did not cite, nor treat in the text as a valid and binding regulation, Supplement No. 2.

The Department obviously regards the tender contemplated by Supplement No. 2 as involving a discretionary waiver of the executory privilege available to the Department. We respectfully submit that this position is insupportable except on the theory that the Executive does have an absolute right to make the final binding determination whether to disclose material when it is duly subpoenaed by

court processes, and whether such an absolute privilege exists when exculpatory material is sought by one who alleges that he is being detained in violation of his constitutional rights, is we submit the sole question presented for determination in this case.

(B)

Two distinct aspects of the exercise of judicial power are here involved. On the question of public security, it may be well that counsel, as distinguished from the court, should not be permitted to examine the requested documents providing the Department has first made a showing that public interest indeed might be seriously affected by the disclosure of the particular material.* In such case, the court, in the exercise of its judicial function could well determine against disclosure. This was not, however, the view of the District Court in this case. It is apparent from the court's comments that while the occasion was limited to the problem of materiality, the District Court regarded the members of its bar as an integral functioning part of the court, and as such, to be trusted to the same degree as the court itself in connection with full participation in both determinations.

In the interest of avoiding the accumulation of absolute power in any one functionary in order that fundamental liberties of the individual may be preserved at all costs,

* The only security reason advanced by the United States Attorney for non-disclosure was a general statement that death might come to an informer if the reports were divulged. The public policy respecting disclosure of informers has been recognized by this Court as subject to the qualification "unless essential to the defense, as, for example, where this turns upon an officer's good faith". (*Scher* v. *United States*, 305 U. S. 251, 254.) The same qualification of necessity must be applied where a prisoner's liberty turns upon that same good faith. The District Court's comment, "I cannot believe the public security is going to be adversely affected by their seeing those papers", (Rec. 125) was therefore warranted on the facts as presented to the Court.

there is much to be said for the District Court's view. So long as there is a voice to be raised in protest against usurpation of power, the democratic processes, contemplated by our form of government, will continue to function. This, of necessity, involves implicit trust in all members of the bar, not government attorneys alone. If attorneys are indeed officers of the court, idealistic though it may appear, this is not an unthinkable proposition.

In the interest of guaranteeing the continued future functioning of these processes, it may be far better to incur the risk of an occasional rash disclosure than to put the final judicial seal of approval on prohibiting in any instance, the traditional use of judicial processes by those who claim their fundamental constitutional rights are being violated. It is hard to conceive of a situation where great public interest is in jeopardy in which any court would in fact exercise its discretion to require disclosure to the detriment of the public interest. Certain it is that our courts may be trusted to determine on the facts of each case as they arise whether disclosure should be required and the extent to which participation in the determination shall be accorded to counsel.

As to the second phase of the judicial function involved in this question of privilege, there exists no possibly valid reason for non-disclosure. The advice of counsel on questions of materiality, relevancy, and the like, is an integral and essential part of the judicial processes. Absent the problem of public security, there exists no reason why the judicial processes cannot be permitted to be exercised in their traditional fashion, unaffected by the fact that the government, and not a private person is the possessor of the records sought.

In conclusion, upon this point, we submit that in the very existence of this proceeding and the presentation of the instant question to this Court, lies the key to the con-

tinued existence of the American way of life. Under our Constitution, any *person* (let alone *citizen*) has recourse to our courts for an adjudication of his claims of arbitrary or unlawful government action. So long as this recourse is kept a living reality, no ideology based upon the premise that the State is supreme and the individual as against it, is without rights, be he of highest or lowest estate, can prevail. If, on the other hand, the individual, be he of high or lowly estate, is to be deprived of alleged exculpatory material at the whim of the Executive or a subordinate of his, simply because the material happens to be in the possession of an instrumentality of the government, then indeed had we best express concern for those liberties which we have always believed are part and parcel of our American birthright.

II.

Department of Justice Order 3229 as Utilized by the Department of Justice in This Case, is Inconsistent With Law, Being an Encroachment Upon the Judicial Power Vested in the Courts by Article III Section 1 of the Constitution of the United States.

Nothing is more fundamentally a part of the judicial power, than the right of a Court to compel obedience to its own process, orders and decrees. This is one of the basic and inherent attributes of a Court. It is equally clear that the determination whether in any given case reasons of public interest require non-disclosure of information, is and must be a judicial determination. Order No. 3229, as acted upon by the Department of Justice in this case, and as construed by the majority of the Court of Appeals in the decision sought to be reviewed, prohibits the Court from exercising its judicial powers and from making the determination involved.

The encroachment directly does violence to the basic constitutional principle of separation of powers. Mr. Justice Story, in his Commentaries on the Constitution of the United States, thus states the principle (Vol. II, p. 2):

> "In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should forever be kept separate and distinct. * * *
>
> "Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object and extent of the maxim and of the reasoning by which it is supported. The remarks of Montesquieu on the subject will be found in a professed commentary upon the constitution of England (Montesquieu, B. 11 ch. 6). 'When,' says he, 'the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty, because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judiciary power be not separated from the legislative and executive'."

As to the relative impotence of the court except in the field of judicial decision to protect its own powers, we again respectfully call to the attention of the court the excerpt from Mr. Justice Story's Commentaries on the Constitution of the United States, Vol. II, page 23 set forth on pages 14-15 of the Petition filed in this case.

The Doctrine of Separation of Powers was adopted by the convention of 1787 to preclude the exercise of arbitrary

power (dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52 (293) (referred to in Petition, page 17)) and one of the basic thoughts in the minds of the framers of our constitutional government was the prevention of the accumulation of all powers, legislative, executive, and judicial, in the same hands. This accumulation, as is pointed out in the Federalist No. 47, quoted in Mr. Justice Story's Commentaries, Vol. II at page 6, might "be justly pronounced the very definition of tyranny".

This Court in *Marbury* v. *Madison*, 1 Cranch, 137 (1803) asserted and exercised its inherent power to require employees of the executive branch of the government to comply with its processes. There the issue arose upon the objection of the Attorney General (who had formerly been Acting Secretary of State) and of certain clerks to testify in the case. The proceedings in this regard before This Court, are thus summarized in 1, Dallas 3rd Edition (1854), 267 at p. 268:

> "Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court and were required to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.
>
> "The Court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objection to answering each particular question, if they had any.
>
> "Mr. Lincoln, who had been the Acting Secretary of State, when the circumstances stated in the affidavit occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.
>
> "The Court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought that anything

was commanded to him confidentially, he was not bound to disclose, nor was he obliged to state anything that would criminate himself."

After the court's ruling, Mr. Lincoln took the stand and as appears from the report of the proceedings in 1 Cranch 137, at p. 144 answered all questions put to him, except one in connection with which he professed lack of knowledge.

In considering the import of the remarks of the Court as to the "confidential" matters involved in the case, the Court's attention is also called to the distinction between political and non-political acts of the Executive set forth in Chief Justice Marshall's opinion. Thus, Chief Justice Marshall said, after discussing purely political acts (1, Dallas at page 277):

> "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his own conduct, and cannot at his discretion sport away the vested rights of others.
>
> "The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

In the case at bar, no political act of the executive is involved. Instead, the case presented is one in which an individual who considers himself injured has resorted to

the laws of the country for a remedy and has sought to reach exculpatory material for the purpose of making that remedy effective. It is in the light of these facts that the propriety of compelling disclosure should, we respectfully submit, be determined and in reaching that determination, we call to the attention of the Court, the following summary by Dean Wigmore contained in his work Wigmore on Evidence, 3rd Edition, Section 2379 (Vol. VIII, pg. 799):

> "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States."

Viewed from the standpoint of the rights of the individual as against his government, we respectfully submit that the order here under consideration, arrogating to the Executive Department alone, the absolute right to determine what documents may or may not be produced in response to court processes, should be held invalid as inconsistent with basic law.

III.

The Decision of This Court in Boske v. Comingore, 177 U. S. 459 Does Not Sustain the Validity of Order 3229 in the Light of the Encroachment Upon Judicial Powers Here Involved.

The majority opinion in the Court below felt that the decision of this Court in the case of *Boske* v. *Comingore*, 177 U. S. 459, was conclusive with respect to the validity of Order 3229. That case was not concerned with the rights of an individual asserting constitutional guaranties. This Court did not there decide that such an order was valid when production was sought in an attempt to enforce constitutional rights.

In the *Boske* case this Court had before it the validity of Treasury Department Rule X and held that the regulation prohibiting disclosure of tax data obtained by Collectors of Internal Revenue, was authorized by Section 161 of the Revised Statutes (5 U. S. Code 22), the same Statute relied upon to sustain the validity of Order 3229. That Statute is a "Housekeeping Statute". It authorizes the heads of the various departments to prescribe regulations *not inconsistent with law for the custody, use and preservation of the records, papers and property pertaining to his department.* This Court held that under the circumstances existing in the *Boske* case the Treasury Department regulation was not inconsistent with law within the meaning of the Statute.

In the *Boske* case an employee of the United States had been adjudicated in contempt of a State Court for his refusal to produce tax records sought by State taxing bodies to aid them in the collection of State taxes. He was released upon a writ of habeas corpus issued by the United States District Court and the case was heard in this Court on appeal from the order discharging the collector from custody.

We concede that within their spheres the State Courts are every bit as much a part of the judicial framework of our government as are the United States District Courts, but in considering what issues were actually decided in the *Boske* case it cannot escape attention that the matter was presented to this Court in an atmosphere colored by protection of Federal Government officials against action at the behest of state taxing authorities and that no problem of executive versus judicial power and authority was present in the case or in the minds of the Court or parties at the time it was presented.

Certainly this Court, in the *Boske* case did not purport to lay down any definitive rule of law prescribing the respective spheres of action of the Courts and the Executive Department. In considering the breadth to be accorded the *Boske* decision, the effect of the dangers to the revenue collecting facilities of the United States in the situation there present cannot be overlooked. If data furnished to United States tax collectors were immediately available to all state taxing agencies, a reluctance to furnish that data was certainly to be anticipated. No such policy element is present in this case.

Boske v. *Comingore*, 177 U. S. 459, did not decide that a person whose liberty was either in jeopardy or restrained might be deprived of exculpatory evidence at the will of the Department of Justice. Apparently for this reason the great bulk of the recently decided cases in the lower Courts, by use of the fiction of waiver or otherwise have made such evidence available, despite the government's claim of privilege. A number of these are collected in a footnote.*

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* *Crosby* v. *Pacific S. S. Line*, 133 Fed. (2) 470 (1943) (C. C. A. 9th); *United States* v. *Grayson*, 166 Fed. (2) 863 (1948) (C. C. A. 2nd); *United States ex rel. Schlueter* v. *Watkins*, 67 Fed. Supp. 556 (1946) (D. C. N. Y.); *Sorrentino* v. *United States*, 163 Fed. (2) 627 (1947) (C. C. A. 9th); *Bankline* v. *United States*, 163 Fed. (2) 133 (1947) (C. C. A. 2d); *United States* v. *Beekman*, 155 Fed. (2) 580 (1946) (C. C. A. 2d); *United States* v. *Krulewitch*,

Since the date of the *Boske* decision, the functions, offices and agencies of the government have expanded in a manner then undreamed of. The problem of obtaining information from governmental sources for use in pending litigation is now a constant and pressing one. Where, as in this case (Rec. 116), application is, prior to the issuance of the subpoena, made directly to the department affected, and the department is afforded ample opportunity to present its views by means of a motion to quash or otherwise, there exists no practical reason to fear embarrassment to the regular functioning of the department, and no impelling reason to prohibit the Court (which will always accord full weight to the department's views) from exercising its judicial function of determining whether the material sought should be produced.

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145 Fed. (2) 76 (1945) (C. C. A. 2d); *United States* v. *Cohen*, 145 Fed. (2) 82 (1945) (C. C. A. 2d); *United States* v. *Andolschek*, 142 Fed. (2) 503 (1944) (C. C. A. 2nd); *United States* v. *General Motors Corp.* (D. C. Ill., 1942), 2 F. R. D. 528; *Bowles* v. *Ackerman* (D. C. N. Y., 1945), 4 F. R. D. 260; *O'Neill* v. *United States* (D. C. Pa., 1948), 79 Fed. Supp. 827, 830; *Zimmerman* v. *Poindexter* (D. C. Hawaii, 1947), 74 Fed. Supp. 933, 936.

Conclusion.

In conclusion we respectfully submit that Order No. 3229 of the Department of Justice, as applied in this case, is not consistent with law and that the decision of the Court of Appeals for the Seventh Circuit should be reversed and set aside and that the judgment order of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX.

"Office Of The Attorney General
Washington, D. C.
May 2, 1939.

Order No. 3229.

Pursuant to authority vested in me by R.S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
Attorney General."

"Department of Justice
Washington 25, D. C.

June 6, 1947.

Order No. 3229.

Supplement No. 2.

To All United States Attorneys:

Procedure To Be Followed Upon Receiving a Subpoena *Duces Tecum*.

Whenever an officer or employee of the Department is served with a subpoena *duces tecum* to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of ar-

bitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK,
Attorney General."